

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 16, 2004

Administrative Office of the U. S. Courts

Leonidas Ralph Mecham, Director

A SUMMARY FOR BENCH AND BAR
(AUGUST 2003)

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules have proposed amendments to various rules and are seeking public comment on the proposed changes.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted on the Internet at <www.uscourts.gov/rules> and are available on request from the Secretary to the Standing Committee. The synopses on the following pages highlight the major aspects of the proposed Appellate, Bankruptcy, Civil, and Criminal Rule amendments. The synopses are intended to stimulate greater public comment and participation in the rulemaking process. The synopses are drawn largely from the committees' reports, which are also set out in the *Request for Comment* pamphlets.

The rules committees welcome all comments, whether favorable, adverse, or otherwise. All comments from the public on these proposals will be considered individually and carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges.

Written comments or comments sent electronically must be received by the Secretary to the Standing Committee **no later than February 16, 2004**. Comments may be sent electronically via the Internet at <www.uscourts.gov/rules>.

An opportunity is also provided to the public to appear at scheduled public hearings to testify regarding the proposals. Requests to appear at a public hearing must be received by the Secretary to the Standing Committee no later than 30 days prior to the scheduled date for the public hearing. Information on the Secretary's mailing address and the dates and places of the scheduled public hearings is set out at the end of this brochure.

Under the proposed schedule, the rules amendments would become effective on December 1, 2005, or later if — following the public comment period — they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress.

I. Proposed Amendments to the Federal Rules of Appellate Procedure:

Rule 4 (Appeal as of Right — When Taken) would be amended to clarify the conditions for reopening the time to appeal a district court's judgment or order. Under the proposed amendments, a party may move to reopen the time to appeal as long as the party had not received notice in accordance with Federal Rules of Civil Procedure 77(d) and 5(d) of the entry of judgment or order within 21 days after its entry. The proposed amendments correct an unintended ambiguity that had arisen in the comprehensive restyling of the Appellate Rules in 1998 concerning the type of notice that precludes later moving to reopen the time to appeal under this rule. The amendments also clarify that only written notice triggers the time to move to reopen the time to appeal, thus resolving a circuit split that developed over the issue.

Under the proposed amendments to **Rule 26** (Computing and Extending Time) and **Rule 45** (Clerk's Duties), the phrase "Presidents' Day" would be replaced with "Washington's Birthday" to conform to 5 U.S.C. § 6103(a), which officially designates the third Monday in February as "Washington's Birthday."

Rule 27 (Motions) would be amended to add a new subdivision that would make clear that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface and the type-style requirements of Rule 32. Currently, there are no provisions that govern the typeface or type-style in such papers. The proposed amendments are necessary to prevent abuses, such as litigants using very small typeface to compress as many words as possible into the pages permitted under Rule 27.

Under the proposed amendments to **Rule 28** (Briefs), the provisions dealing with cross-appeals are transferred to a proposed new **Rule 28.1** (Cross-Appeals). The new rule would consolidate in one place the provisions regarding briefing in cross-appeals and would add several new provisions to fill the gaps in the existing rules dealing with cross-appeals. **Rule 32** (Forms of Briefs, Appendices, and Other Papers) and **Rule 34** (Oral Argument) would also be amended to cross reference new Rule 28.1.

New **Rule 32.1** (Citation of Judicial Dispositions) would require courts to permit the citation of opinions, orders, judgments, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like. The new rule would also require a party who cites an "unpublished" disposition that is not available in a publicly accessible electronic database to file a copy of the disposition. The scope of the proposed new rule is extremely limited: it takes no position on whether designating opinions as "non-precedential" is constitutional; it does not prohibit any court from issuing an "unpublished" opinion; it does not prescribe the circumstances under which a court may choose to designate a disposition as "unpublished" or "non-precedential"; and it does not dictate what effect a court must give an "unpublished" disposition.

The proposed amendments to **Rule 35** (En Banc Determination) resolve a circuit split over the interpretation of 28 U.S.C. § 46(c), which provides that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Amended Rule 35 adopts the "case majority" approach in which disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. For example, in a case in which five of a circuit's twelve active judges are disqualified, only four judges (a majority of the seven non-disqualified judges) must vote to hear a case en banc.

II. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

Rule 1007 (Lists, Schedules and Statements; Time Limits) would be amended to require the debtor in a voluntary case to submit with the petition a list of the names and addresses of each entity entitled — under specified schedules prescribed by the Official Forms — to receive notice of the bankruptcy filing. This "mailing-matrix" information is required by virtually all courts under local rules.

The proposed amendments to **Rule 3004** (Filing of Claims by Debtor or Trustee) and **Rule 3005** (Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor) conform to § 501 of the Bankruptcy Code. Under the proposed amendments to Rule 3004, the debtor and trustee must wait and may not file a proof of claim until the creditor's opportunity to file a proof of claim has expired. Because the debtor and trustee cannot file a proof of claim until after

the creditor's time to file has expired, the proposed amendments also do not allow the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The proposed amendments to Rule 3005(a) delete, as unnecessary, the language in the existing rule that permits a creditor to file a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor.

The proposed amendments to **Rule 4008** (Discharge and Reaffirmation Hearing) establish a deadline for filing a reaffirmation agreement with the court. In a case in which the debtor is not represented by counsel, the timely filing of a reaffirmation agreement will alert the court to hold a hearing advising the debtor of the agreement's legal consequences required by § 524(d) of the Code. The rule also would be amended to give courts the discretion to set the hearing at an appropriate time.

Rule 7004 (Process; Service of Summons; Complaint) is amended to specifically authorize the clerk to issue a summons electronically. The proposed amendments do not address the service requirements for the summons, which are set forth elsewhere in the rules.

The proposed amendments to **Rule 9006** (Time) clarify the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Civil Rule 5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond expires. The proposed amendments are consistent with the proposed amendments to Federal Rule of Civil Procedure 6(e).

III. Proposed Amendments to the Federal Rules of Civil Procedure:

New **Rule 5.1** (Constitutional Challenge to Statute — Notice and Certification) requires that a party who files a paper that draws into question the constitutionality of an Act of Congress or a state statute must file and serve notice of such challenge on the United States Attorney General or state attorney general. Such notice ensures that the appropriate government official is informed of a constitutional challenge and can intervene at the earliest possible stage in the litigation. The new rule replaces the final three sentences of Rule 24(c), which set out the court's notification duty.

Rule 6 (Time) would be amended to clarify the method of counting the additional three days provided to respond if service is by mail or one of the methods prescribed in Rule 5(b)(2)(C) or (D). Under the proposed amendments, three additional days would be added after the prescribed period expires. All other time-counting rules remain unchanged.

The proposed amendment to **Rule 27** (Depositions Before Action or Pending Appeal) corrects the outdated cross-reference to former Civil Rule 4(d). The amendment makes clear that all methods of service authorized under Rule 4 can be used to serve a petition to perpetuate testimony.

Amended **Rule 45** (Subpoena) would require that a deposition subpoena state the manner for recording testimony. Under the present rules, a non-party deponent may not be notified of how the deposition will be recorded. Providing early notice of how testimony will be recorded enables a deponent to raise any objections to the deposition in a timely and efficient manner.

Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims (In Personam Actions: Attachment and Garnishment) would be amended by fixing the time for determining whether a defendant is "found" in the district at the time when the verified complaint and the accompanying affidavit are filed. The proposed amendments are intended to prevent a defendant from defeating attachment and evading a security device by waiting until a complaint is filed before appointing an agent to receive service of process.

The proposed amendments to **Rule C**, Supplemental Rules for Certain Admiralty and Maritime Claims (In Rem Actions: Special Provisions) are technical in nature and correct amendments made in 2000.

IV. Proposed Amendments to the Federal Rules of Criminal Procedure:

The proposed amendments to **Rule 12.2** (Notice of an Insanity Defense; Mental Examination) authorize a court to exclude expert evidence on the issue of the defendant's mental disease, mental defect, or any other mental condition if the evidence is not timely disclosed or if the defendant fails to submit to an examination in accordance with the rule.

The amendments to **Rule 29** (Motion for a Judgment of Acquittal), **Rule 33** (New Trial), and **Rule 34** (Arresting Judgment) would permit a court to extend the time for filing the designated motion, even if the court rules on the matter after the expiration of the specified seven days, so long as the motion for an extension was filed within the seven-day period. **Rule 45** (Computing and Extending Time) would be amended consistent with the proposed amendments to Rules 29, 33, and 34.

Amended **Rule 32** (Sentencing and Judgment) extends the right of allocution to a victim of a felony offense not involving violence or sexual abuse. The proposed amendments also provide the court with discretion to limit the number of victims who may address the court in cases involving multiple victims.

Rule 32.1 (Revoking or Modifying Probation or Supervised Release) would be amended to provide the right of allocution to a person in a revocation hearing or a modification hearing in which the terms or conditions of the defendant's probation or supervised release may be modified.

New **Rule 59** (Matters Before a Magistrate Judge) sets out procedures for a district judge to review dispositive and nondispositive decisions by a magistrate judge. The proposed rule also provides that failure to object to a magistrate judge's decision in accordance with the rule amounts to a waiver of the issue. The proposed amendments are intended to parallel Federal Rule of Civil Procedure 72.

Public hearings are scheduled to be held on the amendments to

- Appellate Rules in Los Angeles, California, on January 20, 2004, and in Washington, D.C., on January 26, 2004;
- Bankruptcy Rules in Washington, D.C., on January 30, 2004;
- Civil Rules in Houston, Texas, on January 9, 2004; and
- Criminal Rules in Atlanta, Georgia, on January 23, 2004.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States

Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically via the Internet at <www.uscourts.gov/rules>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <www.uscourts.gov/rules> on the Internet. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
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